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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 GABRIEL ECKARD

10 Plaintiff,

11 v.

12 NADHEZDA NIKOLINA, *et al.*,

13 Defendants.

CASE NO. C19-881 RSM

ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DISMISSING ACTION

14 This matter comes before the Court on the Report and Recommendation (“R&R”) of the
15 Honorable Brian A. Tsuchida, United States Magistrate Judge. Dkt. #6. The R&R recommends
16 dismissal of Plaintiff’s complaint under 28 U.S.C. § 1915(e)(2)(B), on the basis that Plaintiff has
17 failed to state a claim for violation of his rights under the Fourteenth Amendment due process
18 clause and the Sixth Amendment. *Id.* at 2. The R&R finds that no amendment can cure this
19 deficiency. Plaintiff Gabriel Eckard has not filed objections in this case.

20 The Court agrees with the findings and conclusion of the R&R recommending dismissal
21 of Plaintiff’s complaint with prejudice and without further leave to amend. Furthermore, under
22 the Prison Litigation Reform Act, a prisoner is limited in the number of times he may bring an
23 action dismissed on the grounds that it is frivolous, malicious, or fails to state a claim. Specifically,

ORDER DISMISSING ACTION
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1 the Act provides, in relevant part:

2 In no event shall a prisoner bring a civil action . . . if the prisoner has, on 3 or more
3 prior occasions, while incarcerated or detained in any facility, brought an action or
4 appeal in a court of the United States that was dismissed on the grounds that it is
frivolous, malicious, or fails to state a claim upon which relief may be granted,
unless the prisoner is under imminent danger of serious physical injury.

5 28 U.S.C. § 1915(g). Nothing in Plaintiff’s complaint or the remainder of the record indicates his
6 threat of imminent danger of serious physical injury. *See generally* Dkt. #5 (alleging unlawful
7 conversion of prison funds to cover legal mail postage costs). Accordingly, dismissal of this case
8 counts as a strike under 28 U.S.C. § 1915(g).

9 In lieu of objections, Plaintiff has filed a Motion to Dismiss stating that he “concur[s] [with
10 the R&R] that dismissal in this case would be appropriate.” Dkt. #7 at 1. Plaintiff’s Motion
11 explains that he failed to consider that a tort claim would be the correct remedy rather than a civil
12 rights claim under 42 U.S.C. § 1983, and that he “is also raising the issue in the trial court.” *Id.*
13 Plaintiff’s efforts to withdraw his Complaint to avoid dismissal under 28 U.S.C. § 1915(e) are not
14 permitted by the Court. *See Love v. Jones*, 2018 U.S. Dist. LEXIS 104595 (S.D. Fla. Jun. 20,
15 2018) (“Allowing prisoners to file multiple complaints, wait until they are screened, and then
16 dismiss only those found to be wanting . . . would frustrate Congressional intent in enacting the
17 PLRA.”); *Davis v. Huskipower Outdoor Equip. Corp.*, 936 F.2d 193, 199 (5th Cir. 1991).

18 Accordingly, having reviewed Plaintiff’s civil rights complaint, the Report and
19 Recommendation of Judge Tsuchida, and the remainder of the record, the Court hereby finds and
20 ORDERS:

- 21 1) The Report and Recommendation (Dkt. #6) is ADOPTED;
- 22 2) Plaintiff’s complaint (Dkt. #5) and this action are DISMISSED with prejudice and
23 without further leave to amend for failure to state a claim on which relief may be

1 granted under 28 U.S.C. § 1915(e)(2)(B)(ii). The Clerk shall count this dismissal
2 as a strike under 28 U.S.C. § 1915(g); and

- 3 3) The Clerk shall send a copy of this Order to Plaintiff and to the Honorable Brian
4 A. Tsuchida.

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6 DATED this 19th day of July 2019.

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9 RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE